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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

MARIO OROPEZA, Plaintiff and Respondent, v. LAW OFFICES OF SANFORD M. CIPINKO, Defendant and Appellant.	A121047 (Alameda County Super. Ct. No. RG007335461)

This appeal presents a claim that the trial court erred in refusing to dismiss a malicious prosecution suit because it was a strategic lawsuit against public participation (SLAPP suit). The trial court denied a motion to strike brought under Code of Civil Procedure section 425.16.[1] We affirm.

BACKGROUND

Mario Oropeza filed suit against appellant Law Offices of Sanford M. Cipinko (Cipinko) for malicious prosecution. Cipinko appeals from the denial of its special motion to strike Oropeza's complaint.

The personal injury action on which the malicious prosecution suit is premised arose out of an incident at the Fire Creek Grill in Kent, Washington. Cipinko filed the personal injury action against respondent Oropeza on behalf of the Cipinko firm's client,

[1] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

Steven Smith. Oropeza was not involved in the incident and, in fact, was at home in California when it occurred.

The facts known to Cipinko when he filed the suit against Oropeza are those reflected in the police reports and witness statements from the incident at the Fire Creek Grill. Oropeza's son, Mathias Passantine-Oropeza, was in Kent for a classic car show with his employer, Tim Tomas.[2] Mathias was 20 years old at the time and lived in California with his father. Mathias, Tomas, Smith, and others had dinner and drinks together at the Fire Creek Grill. Everyone was drinking and Mathias became intoxicated. Smith and Mathias appeared to be in friendly conversation for much of the evening. One witness reported they were debating "who can drink one under the table." According to Smith, Mathias asked him where they might continue drinking and Smith suggested his motel room. Smith said Oropeza responded, "Your place?", and then struck him in the face with a heavy beer mug. Smith incurred multiple facial fractures from the blow.

When Oropeza heard about the incident, he contacted Smith to discuss paying for Smith's medical costs and to possibly dissuade Smith from pursuing criminal charges against Mathias. Oropeza believed it was clear to Smith that Oropeza had no responsibility for Smith's injuries, but that he was willing to help Smith if he could.

In the following days Smith and Oropeza spoke with Kent police about potential criminal charges against Mathias. Both told police they were talking to lawyers. Smith said he had contacted three or four attorneys but could find none willing to take his case because "they see, uh, apparently, nothing to sue. . . . [T]he first thing they ask is this person, like do they have money? Do they have a house? Can they be sued? I said, 'I don't know. I don't think so.' "

Smith contacted Cipinko after several other firms declined to take his case. According to Cipinko, he and his associates met with Smith and reviewed the police report, witness statements, medical records, and Smith's correspondence with the other attorneys he had approached about representation. Cipinko determined that Oropeza

[2] To avoid confusion, we will refer to Oropeza's son as Mathias.

"may be potentially liable on the basis of the facts relayed to me by Smith. Those facts gave me reason to believe that Mario Oropeza may have had control of his son, knew of his son's violent propensities, and failed to warn the traveling party of his son's violent propensities." Cipinko later told Oropeza's attorney that he decided to sue Oropeza in order to secure a potential recovery from Oropeza's homeowner's liability insurer.

Cipinko filed suit against Oropeza and his son the same day he met with Smith. The allegations described the incident at the Fire Creek Grill and said Oropeza "is the father of Defendant MATHIAS PASSANTINE-OROPEZA and prior to and including July 30, 2005 MARIO OROPEZA and MATHIAS PASSANTINE-OROPEZA lived together in the same household in El Cerrito, California." The complaint alleged that Mathias "had a habit of becoming violent and violently attacking people when he was drunk"; that Oropeza knew about his son's predilection for drunken violence and failed to warn his son's employer of such predilection; and that Oropeza's failure to warn Tomas was a proximate cause of Smith's injuries.

Oropeza demurred. He argued the complaint did not allege he was negligent, and that it failed to state a basis for parental liability because it did not (and could not) allege Mathias was a minor. "Lacking physical custody and control at the critical time of the incident, when plaintiff and the son were becoming intoxicated hundreds of miles away in Washington State, defendant Ororpeza [*sic*] cannot be held liable on any conduct of his own." Cipinko opposed the demurrer by arguing that Oropeza had a duty to control Mathias "with whom he lived and controlled and/or had the ability to control," but did not identify any additional facts that might support a legal claim that Oropeza had a duty to control his adult son.

The trial court agreed with Oropeza and ruled that "There is no duty on the part of a parent to warn others of the dangerous propensity of one's adult child, nor to control the adult's child's conduct." The demurrer was sustained without leave to amend.

Following the ruling on demurrer, Oropeza cross-complained against Smith for malicious prosecution. When the malicious prosecution claim[3] was not resolved in mediation, Oropeza dismissed his action against Smith without prejudice and filed this action against Cipinko.

Cipinko moved to strike Oropeza's complaint under section 425.16 as a SLAPP suit. Cipinko argued, inter alia, that Oropeza could not establish a reasonable probability of prevailing on the merits of his malicious prosecution action because (1) Cipinko had probable cause to prosecute the personal injury action against Oropeza; and (2) he did not act with malice. In his declaration in support of his motion, Cipinko said that after he first met with Smith and reviewed Smith's documents, he "determined that [Oropeza] may be potentially liable on the basis of the facts relayed to me by Smith. Those facts gave me reason to believe that Mario Oropeza may have had control of his son, knew of his son's violent propensities, and failed to warn the traveling party of his son's violent propensities."

The court denied the special motion to strike. The court found that, even though the malicious prosecution suit was protected activity within the meaning of section 425.16, Oropeza demonstrated a probability of prevailing on the merits of his claim. The court explained that Smith's personal injury action against Oropeza terminated in Oropeza's favor and that Oropeza "presented facts which could permit a finding that Cipinko filed a claim that no reasonable attorney would have believed to be tenable, and without a good faith pre-filing investigation, based upon the facts known to him and upon the state of the law at the time. . . . [¶] This evidence of a lack of probable cause, coupled with the facts undisputed by Cipinko—that Cipinko himself stated that he filed the suit against Mario Oropeza in order to reach [Oropeza's] homeowners' policy, and the statement by Cipinko associate Dela Campa that she believed the claim against Oropeza had no merit—would support a finding of malice." This appeal timely followed.

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[3] The parties did reach agreement with respect to Smith's personal injury claim against Mathias, and Mathias's cross-complaint for indemnification against Smith and Tomas.

DISCUSSION

I. *The Anti-SLAPP Statute*

Certain unmeritorious claims that are brought to thwart constitutionally protected speech or petitioning activity may be stricken pursuant to a motion filed under section 425.16. (See *Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 102.) It provides: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).) Consideration of a section 425.16 motion to strike involves two steps. "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue,' as defined in the statute. (§ 425.16, subd. (b)(1).) If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim." (*Equilon Enterprises* v. *Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.)

Oropeza's complaint seeks to impose liability on Cipinko for petitioning the court through his allegedly malicious prosecution of the personal injury case. Resolution of the section 425.16 motion to strike thus turns on the second inquiry: whether Oropeza demonstrated a reasonable probability of success on the merits. An anti-SLAPP motion must be denied " 'if the plaintiff presents evidence establishing a prima facie case which, if believed by the trier of fact, will result in a judgment for the plaintiff.' " (*Fleishman v. Superior Court* (2002) 102 Cal.App.4th 350, 356.) In assessing the evidence, the trial court neither weighs the credibility or comparative probative strength of competing evidence nor decides disputed questions of fact. (*Ibid*.) "In order to satisfy due process, the burden placed on the plaintiff must be compatible with the early stage at which the

motion is brought and heard [citation] and the limited opportunity to conduct discovery." (*Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 823, disapproved on other grounds in *Equilon Enterprises v. Consumer Cause, Inc.*, *supra*, 29 Cal.4th at p. 68, fn. 5.) Only a minimal showing of merit is required. (*Yu v. Signet Bank/Virginia* (2002) 103 Cal.App.4th 298.) We review the trial court's ruling on an anti-SLAPP motion independently and apply the de novo standard of review. (*Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 929.)

II. *The Probability of Oropeza Prevailing on the Merits*

To prove a cause of action for malicious prosecution, a plaintiff must establish that the prior action was (1) commenced by or at the direction of the defendant and was pursued to a legal termination in the plaintiff's favor; (2) brought without probable cause; and (3) initiated with malice. (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 871.) Cipinko does not challenge the trial court's findings that Oropeza demonstrated a likelihood of establishing the first and third elements of a malicious prosecution claim. When we consider whether the personal injury action terminated in Oropeza's favor and was initiated by Cipinko with malice, our de novo review of the record satisfies us that Oropeza made a sufficient showing on those two elements. Cipinko's appeal, rather, focuses exclusively on the second element of malicious prosecution: probable cause. The question, then, is whether Oropeza demonstrated the existence of a prima facie case that, if believed by the trier of fact, would result in a finding that Cipinko had no probable cause to file the personal injury suit against him.

The existence of probable cause is also a question of law, which we review de novo. (*Arcaro v. Silva & Silva Enterprises Corp.* (1999) 77 Cal.App.4th 152, 156.) "The standard for determining the probable cause element is objective, not subjective. The trial court is called upon 'to make an objective determination of the "reasonableness" of the defendant's conduct, i.e., to determine whether, on the basis of the facts known to the defendant, the institution of the prior action was legally tenable.' [Citation.] Whether a claim is legally tenable is tested by 'whether any reasonable attorney would have thought

the claim tenable . . . .' " (*Swat-Fame, Inc. v. Goldstein* (2002) 101 Cal.App.4th 613, 624, disapproved on other grounds in *Zamos v. Stroud* (2004) 32 Cal.4th 958, 973.)

We work from the premise that Cipinko was entitled to rely on the facts related to him by his client. (See *Sheldon Appel Co. v. Albert & Oliker, supra*, 47 Cal.3d at pp. 882-883; *Arcaro v. Silva & Silva Enterprises Corp., supra,* 77 Cal.App.4th at pp. 158-159 [unless put on notice of dispute as to specific, verifiable facts that would negate a claim, attorney is generally entitled to assume client's factual representations are true].) But, assuming the facts to be as stated by Cipinko, no reasonable attorney would believe that Oropeza could be held liable for his 20-year-old son's conduct hundreds of miles away from home, whether on a theory of duty to control or duty to warn.

As Cipinko correctly concedes, a parent generally has no legal duty to warn others of the habits and propensities of adult children or to take control of an adult child. Because Mathias was legally an adult at the time of the altercation, liability for his conduct will not be imposed on his father based on their father and son relationship. (*Cynthia M. v. Rodney E.* (1991) 228 Cal.App.3d 1040, 1042-1043 [liability of parent for torts of *minor* child as exception to general rule of nonliability]; see Civ. Code, § 1714.1; 6 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, §§ 1227-1234, pp. 604-613.)

Nor do the allegations that Mario lived in his father's home and that Oropeza allegedly knew he was prone to drunken violence create a plausible claim.[4] The relevant law is discussed in *Megeff v. Doland* (1981) 123 Cal.App.3d 251, which held that an elderly man's adult daughter was not liable to two individuals stabbed by the man when he was in an apparently demented state. *Megeff* explains: "Ordinarily, one owes a duty of care to ' "all persons who are foreseeably endangered by his conduct, with respect to all risks which make the conduct unreasonably dangerous." ' [Citations.] However, when the avoidance of foreseeable harm requires one to control the conduct of a third person, special rules come into play. [¶] In general, one owes no duty to control the

[4] We are aware that Oropeza disputes these allegations and do not intend by this reference to indicate whether they are true or false. We take no position.

conduct of another person [citations], but the courts have created limited exceptions based on various special relationships between a defendant and *either* the person whose conduct needs to be controlled or the foreseeable victim of that conduct. [Citation.] Section 319 of the Restatement Second Torts delineates a special relationship pertinent to the case at bar: '*One who takes charge of a third person* whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.' " (*Id.* at pp. 256-257.) The requirement of a special relationship between the defendant and either the person who is to be controlled or the victim also applies when liability is premised on a failure to warn those endangered by the conduct of the person to be controlled. (*Hansra v. Superior Court* (1992) 7 Cal.App.4th 630, 644-645.)

The facts as alleged by Cipinko do not support a conclusion that Oropeza had taken charge of his son so as to bring a special relationship into play. To establish liability under this theory, " 'the *ability* to control the third party is essential. " '[T]he absence of such an ability is fatal to a claim of legal responsibility,' " ' " and where (as with the relationship between a parent and an adult child) " ' " 'the natural relationship between the parties . . . creates no inference of an ability to control, the actual custodial ability must affirmatively appear.' " ' " (*Hansra v. Superior Court, supra,* 7 Cal.App.4th at pp. 644-645 [mother-in-law had no duty to warn daughter-in-law of her son's potential for violence]; *Wise v. Superior Court* (1990) 222 Cal.App.3d 1008 [inability to demonstrate wife's control over her mentally ill husband defeated plaintiffs' claim premised on the existence of a special relationship]; *Megeff v. Doland*, *supra*, 123 Cal.App.3d at pp. 260-261.) Cipinko points to no factual allegations that would demonstrate that Oropeza had the ability to control, or had taken control of, his adult son. Although Smith requested leave to amend in opposition to the demurrer in order "to allege additional factual allegations as to [Oropeza's] duty and ability to control [Mathias]," neither then nor in support of his special motion to strike did he identify any facts that could establish such a duty or ability on the father's part to control his adult son.

Cipinko's claim against Oropeza is untenable for another reason. "[T]he duty created by section 319 [of the Restatement Second of Torts] is not necessarily one owed to the world at large; the element of foreseeability remains. The custodian must have knowledge of a specific risk *to an identifiable and foreseeable victim*." (*Megeff v. Doland, supra,* 123 Cal.App.3d at p. 257, italics added; *Wise v. Superior Court, supra,* 222 Cal.App.3d at pp. 1013-1014 & fn. 3.) Cipinko does not say how Oropeza could have known of a specific risk to Smith, a business acquaintance of his son's employer, or to any particular individual or class of individuals. Was Oropeza, because of a common roof and shared bloodline, under a duty to warn the world at large of his adult son's alleged propensity for drunken violence? The answer is clearly no. The trial court correctly concluded that no reasonable attorney would believe Smith possessed a legally tenable tort claim against Oropeza.

Lastly, Cipinko argues the trial court erroneously imposed upon him a duty to investigate the information Smith provided to him before he filed suit. He bases his argument on a comment in the court's ruling that Oropeza presented facts from which it could be found that Cipinko "filed a claim that no reasonable attorney would have believed to be tenable, *and without a good faith pre-filing investigation,* based upon the facts known to him and upon the state of the law at the time." (Italics added.) It is generally true that the adequacy of an attorney's prefiling investigation is not relevant to the determination of probable cause.[5] (*Swat-Fame, Inc. v. Goldstein, supra,* 101 Cal.App.4th at p. 627.) But the court's ruling, in context, does not mean the court believed the lack of a prefiling investigation demonstrated a lack of probable cause.

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[5] Oropeza's statement that probable cause is lacking whenever an attorney fails to "conduct an investigation and establish factual tenability" is incorrect. *Arcaro v. Silva & Silva Enterprises Corp., supra,* 77 Cal.App.4th 152, on which he relies, carved out a narrow exception to the general rule, applicable when a party receives specific, verifiable information that would, if true, undermine an element of its claim. In that situation, probable cause to pursue the cause of action will not be found unless the party possesses "evidence sufficient to support a favorable judgment on that element or at least information affording an inference such evidence can be obtained." (*Swat-Fame, Inc. v. Goldstein, supra,* 101 Cal.App.4th at p. 627; *Arcaro, supra,* at pp. 156-159.)

Rather, we understand the court's reference to a "good faith investigation" to indicate that in the absence of additional facts that may be revealed in an investigation, those known to Cipinko could not support a tenable claim. In any event, the import of the court's language is irrelevant on appeal because we have reviewed the trial court's ruling de novo.

Oropeza satisfied his burden of showing facts sufficient, if credited by a jury, to sustain a favorable malicious prosecution judgment. The trial court correctly denied Cipinko's special motion to strike.

DISPOSITION

The order is affirmed.

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Siggins, J.

We concur:

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McGuiness, P.J.

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Jenkins, J.